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In the Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ANA ESTELA GUEVARA FLORES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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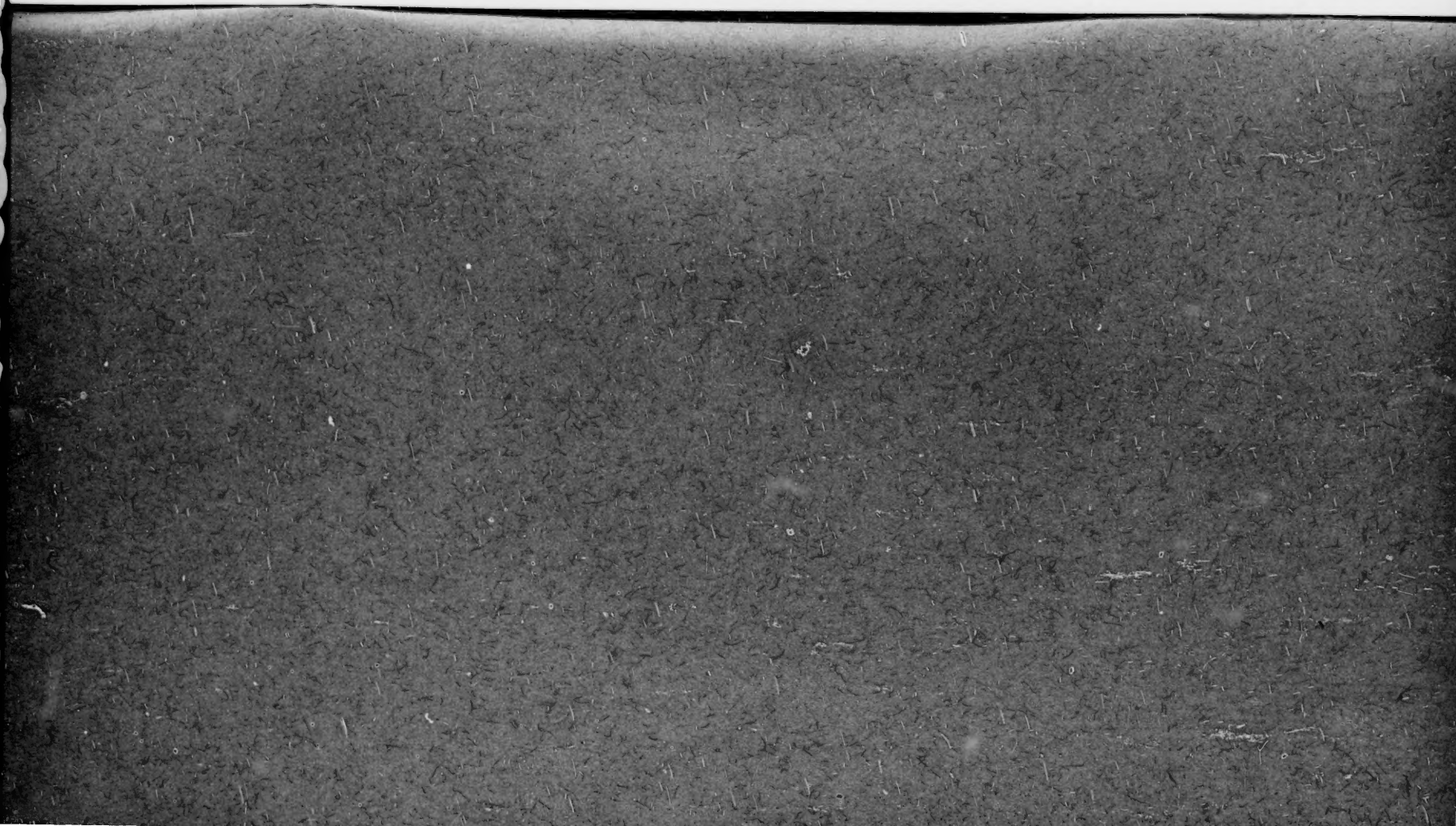

QUESTION PRESENTED

Whether an alien's burden of proving eligibility for asylum pursuant to Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158(a), is equivalent to his burden of proving eligibility for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. 1253(h).

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ANA ESTELA GUEVARA FLORES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 786 F.2d 1242. The opinions of the Board of Immigration Appeals (App., *infra*, 25a-31a) and of the immigration judge (App., *infra*, 32a-42a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1986. A petition for rehearing was denied on June 9, 1986 (App., *infra*, 24a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 101(a)(42) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101(a)(42), provides in pertinent part:

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion * * *.

Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158(a), provides:

> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

Section 243(h)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1253(h)(1), provides in pertinent part:

> The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT

1. Respondent is a native and citizen of El Salvador who entered the United States in Texas on or around June 24, 1981, without inspection by an immigration officer (App., *infra,* 33a). She was apprehended by Border Patrol agents that same day. On June 25, 1981, she was served with an Order to Show Cause initiating deportation proceedings based on the manner of her entry (*ibid.*). At the time of her arrest, respondent had concealed in her clothing an audiotape of the last mass of Archbishop Oscar Romero and letters of introduction to church activists in Puerto Rico written in what the Federal Bureau of Investigation (FBI) termed "classic marxist rhetoric" (App., *infra,* 4a). The Border Patrol, believing these materials to be of a suspicious nature, turned them over to the FBI, which began a foreign counterintelligence investigation for the purpose of ascertaining respondent's identity. The FBI took steps to determine whether respondent, who admitted to having used a "code name" in El Salvador (App., *infra,* 27a), was in fact Norma Fidelina Guevara de Grande, a Salvadoran guerrilla leader known as "Comandante Norma" (App., *infra,* 4a). A fingerprint check showed that respondent is not Comandante Norma (*ibid.*).

At a hearing beginning in October 1981 before an immigration judge, respondent, who was represented by counsel, admitted entry without inspection but denied deportability, claiming status as a refugee (App., *infra,* 5a-6a, 33a). She requested asylum pursuant to Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158(a) (App., *infra,* 6a, 34a).[1] She re-

[1] Under 8 C.F.R. 208, the immigration judge also considered her application for asylum as an application for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. 1253(h) (App., *infra,* 34a).

fused, however, to answer a large number of questions on the application for asylum without a written guarantee of confidentiality (App., *infra*, 35a-36a).[2] The immigration judge denied this initial application, and the Board of Immigration Appeals (BIA) affirmed.

2. Subsequently, respondent moved the BIA to reopen her deportation proceedings based on new evidence that she claimed was previously unavailable (App., *infra*, 26a). The new evidence consisted of three documents that the FBI had declassified and released to respondent pursuant to a Freedom of Information Act request. The first document was a wire dated July 16, 1981, from a legal attache in Panama to the Director of the FBI, which reported that " 'the detention of a young woman alleged to be Norma Fidelina Guevara [Comandante Norma] * * * has received a good deal of play in the Salvadoran press.' " It continued, " 'we are making inquiries here to determine whether the person apprehended in the United States using the name Ana Estela Guevara Flores might in fact be the person press accounts allege to be Norma Fidelina Guevara.' " App., *infra*, 8a (citation omitted). A second wire from the Panama attache informed the Director that Salvadoran authorities had determined that respondent was not Comandante Norma and was not a known guerrilla. The second wire also indicated that respondent might be detained on her return to El Salvador for questioning about possession of subversive literature, which is a crime in El Salvador. App., *infra*, 27a.

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[2] Respondent also refused to testify at her hearing without a written guarantee of confidentiality, and she sought to subpoena all communications between U.S. and Salvadoran agencies (App., *infra*, 22a, 33a-34a). The immigration judge ordered a closed hearing but denied relief in all other respects (App., *infra*, 34a). The BIA and court of appeals affirmed this aspect of the immigration judge's decision.

The remaining document was an internal memorandum from the San Antonio, Texas, office of the FBI to FBI Headquarters in Washington. The memorandum advised that the Salvadoran government had requested that it be notified when respondent is deported to El Salvador and also had asked for the material that she had in her possession when arrested. The memorandum also mentioned that respondent had used a code name in El Salvador and further advised that " 'she showed deception on a polygraph examination to specific questions concerning terrorist activities.' " Finally, it stated that she admitted that her sister was an active terrorist in El Salvador. App., *infra*, 9a, 27a (citation omitted).

In a written decision dated July 25, 1984, the BIA denied the motion to reopen the deportation proceedings (App., *infra*, 25a-28a). Relying on *INS* v. *Jong Ha Wang*, 450 U.S. 139, 141 (1981) (per curiam), the BIA noted that a motion to reopen "should be granted only where a *prima facie* case of eligibility for the relief sought has been established" (App., *infra*, 26a). The BIA concluded that the FBI documents suggested only that the respondent "may be questioned or detained in El Salvador in connection with an investigation into whether she is a terrorist subversive, not that she would be executed [as she had claimed] for her political beliefs" (App., *infra*, 27a). Accordingly, the BIA found that respondent's motion papers failed to "establish a *prima facie* case of either a clear probability that her life or freedom would be threatened or a well-founded fear of persecution in El Salvador on account of her political opinion or any other statutory basis" (App., *infra*, 27a-28a).

3. The court of appeals reversed the BIA's denial of the motion to reopen and remanded for further proceedings. The court held (App., *infra*, 14a-18a) that an alien's burden of proving a "well-founded fear" of persecution to establish eligibility for asylum is less

demanding than the burden of proving a "clear probability" of persecution, which this Court held in *INS* v. *Stevic*, 467 U.S. 407 (1984), is the proper standard to establish eligibility for withholding of deportation. Relying on *Cardoza-Fonseca* v. *INS*, 767 F.2d 1448 (9th Cir. 1985), cert. granted, No. 85-782 (Feb. 24, 1986), and *Carvajal-Munoz* v. *INS*, 743 F.2d 562 (7th Cir. 1984), the court concluded that the well-founded fear of persecution standard refers to the alien's subjective "state of apprehension or anxiety" accompanied by an objective requirement that the fear have "some basis in the reality of the circumstances" (App., *infra*, 15a). The court stated that, in so holding, it "stand[s] with the Sixth, Seventh, and Ninth Circuits which have previously determined that the 'well-founded fear of persecution' standard imposed on asylum applicants differs from the 'clear probability of persecution' standard imposed by *Stevic* on aliens who seek withholding of deportation" (App., *infra*, 16a). The court of appeals explicitly rejected the Third Circuit's holding (*Sotto* v. *INS*, 748 F.2d 832, 836 (1984)) that there is no difference between the proof required for the two forms of relief (App., *infra*, 16a-17a).

Applying its definition of "well-founded fear of persecution," the court then held that respondent had "met her burden on appeal of proving a reasonable likelihood that she will meet the statutory requirements for asylum on reopening" (App., *infra*, 18a). Noting the interest that Salvadoran authorities had taken in respondent's case, the court held that the new evidence she sought to introduce demonstrated that "a reasonable person in [respondent's] circumstances would fear persecution on return to her native country" (*ibid.*).

REASONS FOR GRANTING THE PETITION

This case presents an important, unsettled, and recurring question concerning the appropriate standard that an alien applying for asylum in the United States must satisfy

to be eligible for that benefit. In *INS* v. *Stevic*, 467 U.S. 407 (1984), this Court held that an alien must demonstrate a clear probability of persecution, defined as a showing that "it is more likely than not that the alien would be subject to persecution" (467 U.S. at 424), in order to establish eligibility for withholding of deportation under Section 243(h) of the Immigration and Nationality Act of 1952. The Court, however, left open the question whether the standard for asylum under Section 208(a) of the Act is an equivalent one or instead might differ (467 U.S. at 425, 430). Since *Stevic*, the courts of appeals have divided on the question left undecided in that case, and on February 24, 1986, this Court granted our petition for a writ of certiorari in *INS* v. *Cardoza-Fonseca*, No. 85-782, which presents this very issue.

In the present case, the court expressly relied on *Cardoza-Fonseca* in holding that the "well-founded fear of persecution" standard for determining asylum eligibility is a different and more generous standard than a "clear probability of persecution." We have argued in the petition for certiorari in *Cardoza-Fonseca* and in our brief on the merits that the two standards do not differ. Since the question presented here is not materially different from the one that is already before the Court in *Cardoza-Fonseca*, the Court should hold the petition in this case and dispose of it as appropriate in light of its decision in *Cardoza-Fonseca*.[3]

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[3] The reasoning of the court of appeals, moreover, erroneously presupposes that the Salvadoran government will wrongfully persecute respondent rather than engage in a legitimate investigation to determine whether respondent has violated Salvadoran law or is a threat to that country's internal security. These are valid concerns, and it is reasonable to expect that the government of a foreign country may wish to detain and question an individual who has left that country and entered the United States under suspicious circumstances. The BIA denied the motion to reopen after determining that the

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of *INS* v. *Cardoza-Fonseca*, No. 85-782.

Respectfully submitted.

CHARLES FRIED
Solicitor General

SEPTEMBER 1986

Salvadoran government's interest in respondent was not tantamount to a threat of persecution. Rather than deferring to the BIA's expertise in these matters, or even explaining its basis for differing with the BIA's conclusion, the court simply ignored that determination.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 84-4767

ANA ESTELA GUEVARA FLORES, PETITIONER,

v.

IMMIGRATION & NATURALIZATION SERVICE, RESPONDENT.

Filed April 11, 1986

Before: John R. Brown, Thomas M. Reavley, and Robert M. Hill, Circuit Judges.

Opinion by Judge John R. Brown

Petition for Review of an Order of the Board of Immigration Appeals

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SUMMARY

Immigration and Naturalization

Appeal from Board of Immigration Appeals' denial of a motion to reopen an asylum application. Affirmed in part, reversed in part and remanded.

Guevara, a native of El Salvador, was arrested following her illegal entry into the United States. Items seized at the arrest were turned over to the FBI. The FBI suspected her of being a Salvadoran guerrilla and contacted Salvadoran officials to ascertain her identity. The INS began deportation proceedings and Guevara filed a "Request for Asylum in the United States." However, based on her belief that communications between the United States and El Salvador had already placed her in jeopardy,

she failed to fully complete the request form. Her request for asylum was denied. The FBI subsequently released to Guevara three documents regarding their investigation. She sought reopening of her application based on these documents.

The scope of appellate review is very limited. Two issues are addressed: whether Guevara has shown a reasonable likelihood that she met the statutory requirements for a grant of asylum; and whether she has shown a reasonable likelihood that her case warrants the exercise of discretion in her favor.

Asylum is a form of discretionary relief which the attorney general may grant to an alien who proves he possesses a "well-founded fear of persecution." Because the Supreme Court has not established what an alien must prove to meet the statutory requirements for asylum, it is necessary to construe the term "well-founded fear of persecution" as used in the statutory and regulatory scheme. The standard is subjective in that fear is a state not usually subject to rational measurement, and objective in that the fear must be well-founded. An alien possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country. This is different from the standard applied for withholding of deportation. This difference is based on the difference between the terms "well-founded fear of persecution" and "clear probability" as used in the two statutory schemes. This different standard is also consistent with the structure of the Immigration and Naturalization Act.

Guevara has met the burden on appeal of proving a reasonable likelihood that she will meet the statutory requirements for asylum on reopening. The FBI documents indicate that the head of the Salvadoran military has personally taken an interest in her case, and Salvadoran

authorities have asked to obtain the date and time of Guevara's flight to El Salvador. It is also necessary to determine whether there is a reasonable likelihood that a grant of relief may be warranted as a matter of discretion. On the facts here, it is clear the Immigration Judge could reasonably exercise his discretion to allow asylum. Therefore, Guevara is entitled to reopen her case so that the Immigration Judge may consider the FBI documents obtained since the initial hearing.

Guevara also contends the Government abused its discretion by failing to guarantee the contents of her asylum application would be held in confidence by the INS. However, there is no evidence in the record that the INS ever strayed from its policy of confidentiality with regard to the contents of Guevara's asylum application, and she received all of the guarantees of confidentiality to which she is entitled.

Guevara also contends the decision upholding the denial of her motion for administrative subpoenas was an abuse of discretion. However, on the record presented, it cannot be said the decision was an abuse of discretion.

OPINION

JOHN R. BROWN, Circuit Judge:

In this appeal, an alien seeks review of a decision by the Board of Immigration Appeals denying her motion to reopen her application for asylum in the United States. Because we conclude that the new evidence proffered by the alien constituted a prima facie showing that she was entitled to the relief she requested, and because she has shown a reasonable likelihood that the relief she seeks may be warranted as a matter of administrative discretion, we reverse the decision of the Board. We therefore remand the case for a reopening of the alien's asylum application before the Immigration Law Judge.

A Case of Mistaken Identity

Ana Estela Guevara Flores (Guevara) is a 36 year old native of El Salvador. On or about June 24, 1981, Guevara entered the United States by surreptitiously crossing the border near Laredo, Texas. She was apprehended when Border Patrol agents found her, and twelve other aliens, hiding in a railroad freight car near Cotulla, Texas. At the time of her arrest, Guevara was carrying a tape of the last Mass of the Archbishop Oscar Romero.[1] She was also carrying letters of introduction to church activists in Puerto Rico written in what the Federal Bureau of Investigation (FBI) termed "classic marxist rhetoric."

The Border Patrol believed these materials to be of a suspicious nature, so it turned them over to the FBI, which commenced a foreign counterintelligence investigation for the purpose of ascertaining Guevara's identity. According to counsel for the United States, confidential FBI sources led that agency to suspect that Ana Guevara was a Salvadoran guerrilla leader known by the *nomme de guerre* Comandante Norma. The FBI, therefore, prevailed upon the United States Embassy in El Salvador to obtain a fingerprint card from Salvadoran authorities for Comandante Norma, whose true name is Norma Fidelina Guevara de Grande. The possibility that the notorious comandante Norma had been apprehended in Texas received a good deal of play in the Salvadoran press.

The fingerprint comparisons eventually revealed that Ana Guevara was not, in fact, Comandante Norma. The Salvadoran authorities acknowledged that Guevara was not a known guerilla or a subversive, but they indicated that possession of "subversive literature" was a crime for

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[1] Archbishop Romero was head of the Catholic Archdiocese of El Salvador until he was assassinated during the civil strife in that country.

which Guevara could be detained upon her return to El Salvador.[2] The Salvadoran authorities, therefore, requested the date and number of Guevara's flight in the event she was deported to El Salvador, and asked that copies of the documents in her possession be furnished to the plane's captain for delivery to Colonel Eugenio Vides Casanova, Director General of the Salvadoran National Guard.[3]

Because she entered the United States surreptitiously, Guevara came to the attention of yet another federal agency, the Immigration and Naturalization Service (INS). On the date of her apprehension, Guevara was served with an Order to Show Cause which demanded that she prove she was not subject to deportation under the terms of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2). She was also charged with entering the United States without inspection by immigration authorities, a violation of 8 U.S.C. § 1325.

Guevara, who was unrepresented by counsel at the time, pleaded guilty to the charge that she had violated § 1325. She was sentenced to, and served, a term of ninety days in jail for this offense. The Show Cause Order was set for a hearing before an Immigration Judge on October 8, 1981. At this hearing Guevara conceded the illegality of her entry into the United States, but requested asylum in this

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[2] Guevara obtained this information from three FBI documents released to her under the Freedom of Information Act, 5 U.S.C. §§ 552 et seq. The documents pertain to the FBI's investigation of Guevara and were pertinent to the contentions she raised in her asylum application. For reasons that do not appear in the record, however, the documents were not released to Guevara until roughly two years after Guevara's October 8, 1981 deportation hearing before the Immigration Judge.

[3] Colonel Vides Casanova, then head of the Salvadoran National Guard, has since been promoted to the rank of General and had assumed the post of Minister of Defense in the current Salvadoran government.

country by virtue of her status as a refugee under 8 U.S.C. §§ 1101(a)(42)(A), and 1158(a). In accordance with INS regulations, 8 C.F.R. § 208.2, Guevara filled out Form I-589 entitled "Request for Asylum in the United States."

Guevara, however, left a number of spaces on the form and its addendum blank.[4] She failed to complete the form because of her belief that communications between the United States government and the authorities in El Salvador had already placed her in "extreme jeopardy." In her words

> The United States government has informed the Junta that they have arrest (sic) "La Comandante Norma Guevara." Even though I am not la comandante, the Junta believes that I am, or if they by now recognize that I am not, they consider me to be a revolutionary, thanks to the U.S. Government, and will kill me on return.

Because she had been accused of being Commander Norma, Guevara stated that she could not complete the

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[4] The information Guevara refused to provide covered sixteen categories on Form I-589 and included:

(1) her addresses for the past five years;
(2) the identities and addresses of relatives in the United States;
(3) whether she had taken any actions which she believed would result in her persecution in El Salvador;
(4) whether her family had suffered or been intimidated as a result of her actions;
(5) whether she had other information pertaining to her application that was not covered by the questions on Form I-589;
(6) where she had been employed in El Salvador;
(7) her last address in El Salvador and her reason for leaving her country;
(8) how she traveled from her country, other nations—if any—through which she passed on her way to the United States, and whether she had applied for asylum in any other country;
(9) why she continued traveling to the United States;
(10) whether she had ever belonged to any organizations hostile to the interests of her home country;

remainder of Form I-589 without a guarantee that the contents of her asylym application would remain confidential and would not be the subject of further disclosures to the Salvadoran authorities.

INS, as a matter of policy, forwards all asylum applications to the State Department for an advisory opinion on the merits of the application. Accordingly, Guevara's deportation hearing was recessed while the materials pertinent to her application were forwarded to the Asylum Division at the State Department for their analysis. The State Department concluded that Guevara had failed to meet her burden of proving that she possessed a well-founded fear of persecution if she were to be deported to El Salvador. The Department's opinion was based, in large part, on Guevara's failure to provide information relevant to her claim on Form I-589. The Immigration Judge, therefore, offered her the opportunity to supplement her responses, but in the absence of a guarantee that the contents of her application would remain confidential, Guevara declined to do so.

Upon receipt of the State Department's opinion, Guevara's deportation hearing was reconvened. At the hearing, Guevara moved for the issuance of administrative subpoenas pursuant to 8 C.F.R. § 287.4. She sought production of all communications pertaining to her between the United States Government and the Salvadoran authorities. In support of the motion, her attorney stated that Guevara sought these communications not only for the purpose of showing that her case had received considerable publicity in El Salvador, but also to show that

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(11) the identities and addresses of her relatives outside the United States; and,

(12) specific dates, locations, and incidents in which she had been subjected to persecution.

the communications between the two governments had substantially increased the likelihood that she would be persecuted upon her return to Salvadoran territory. The Immigration Judge, however, denied the motion. He found that much of the information sought was merely cumulative and stated that that information which was not cumulative was more appropriately obtained through a request under the Freedom of Information Act.

Guevara then appealed the decision of the Immigration Judge to the Board of Immigration Appeals (the Board). The Board, in a brief per curiam opinion, affirmed the denial of Guevara's asylum application on the grounds that she had failed to meet her burden of proof. Guevara also contended that the Immigration Judge had erred in denying her requests for confidentiality, but the Board concluded that the Judge had taken "all appropriate measures within his authority to safeguard such confidentiality, including closing the hearing to the public. He could do no more." The Board also affirmed the denial of Guevara's request for administrative subpoenas.

Within a month of the Board's decision, however, the FBI declassified and released three documents, pursuant to Guevara's Freedom of Information Act request, which had not been available at her hearing before the Immigration Judge or during the pendency of her appeal to the Board. The first document was a transmission from a legal attache in Panama to the Director of the FBI which reported that "the detention of a young woman alleged to be Norma Fidelina Guevara . . . has received a good deal of play in the Salvadoran press." It continued "we are making inquiries here to determine whether the person apprehended in the United States using the name Ana Estela Guevara Flores might in fact be the person press accounts allege to be Norma Fidelina Guevara. . . ."

The second document was a transmission from the San Antonio, Texas office of the FBI to FBI Headquarters in Washington. It was this document that identified the communications Guevara was carrying when apprehended as one "written in classic marxist rhetoric." The document also contained the following information:

> The Salvadoran government through Legat, Mexico City has requested that they be advised when [Guevara] is deported to El Salvador and also request[s] the communication she had i[n] her possession.

The final document was a second transmission from the legal Attache in Panama to the Director of the FBI. It informed the FBI that Salvadoran authorities had determined that Guevara was not a known guerilla, nor was she the notorious Comandante Norma. The authorities stated, however, that possession of subversive literature in El Salvador was a crime for which Guevara could be detained upon return to her country. They then reiterated their request for the date and flight number of Guevara's return to El Salvador in the event she was deported, and requested that copies of the documents she was carrying be forwarded for analysis to Colonel Vides Casanova, Director General of the Salvadoran National Guard.

Upon receiving these documents, Guevara filed a motion to reopen her asylum application. In it, she sought to have the Board remand her case to the Immigration Judge so that he might reevaluate her claim that she possessed a well-founded fear of persecution in light of this new evidence.[5]

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[5] In order to obtain reopening, an alien must prove that the new evidence she seeks to offer is material and was not available and could not have been discovered or presented at the former hearing. 8 C.F.R. § 3.2 (1985).

The Board considered Guevara's request in light of a well-settled line of cases holding that motions to reopen should be granted only when the alien can establish, in light of the new evidence, a prima facie case of eligibility for the relief she seeks. *See, e.g., Wang v. Immigration & Naturalization Serv.*, ____ U.S. ____, ____ S.Ct. ____, 67 L.Ed.2d 123 (1981); *Marcello v. Immigration & Naturalization Serv.*, 694 F.2d 1033, 1035 (5th Cir. 1983). The Board evaluated the FBI documents and concluded that they did not "establish a prima facie case of either a clear probability that her life or freedom would be threatened or a well-founded fear of persecution in El Salvador." It reasoned that the documents proved only that "the respondent may be questioned or detained in El Salvador in connection with an investigation into whether she is a terrorist subversive, nor that she would be executed for her political beliefs." The Board, therefore, denied Guevara's motion to reopen and this appeal followed.

Guevara raises three contentions on appeal. First, she argues that the Board erred in denying her motion to reopen her hearing before the Immigration Judge. Second, she asserts that the Immigration Judge abused his discretion in refusing to guarantee that the contents of her asylum application would be held in confidence. Finally, she contends that it was an abuse of discretion to refuse to issue the subpoenas she sought at the deportation hearing.

We believe that the Board's decision to deny Guevara's motion to reopen was an abuse of its discretion. Therefore, we reverse and remand with directions that Guevara be permitted to reopen her application before the Immigration Judge. Guevara's other contentions, however, are without merit and the decision of the Board is, in those respects, affirmed.

Reopening

The initial contention raised by Guevara is that the Board abused its discretion in denying her motion to reopen her case before the Immigration Judge. She sought to introduce as new evidence the three FBI documents she had obtained through her FOIA request. These documents, she asserts, were material to her contention that she harbored a well-founded fear of persecution. She describes their contents as "tantamount to a note from [her] dictator" demonstrating a likelihood of official action against her by the Salvadoran government.

The Board of Immigration Appeals considered Guevara's motion to reopen in accordance with the procedures set out by INS regulations. Those regulations impose upon an alien who seeks reopening the burden of proving that the evidence she seeks to introduce is "material evidence [that] was not available and could not have been discovered at the formal hearing." 8 C.F.R. § 3.2. While conceding that the evidence Guevara sought to offer was unavailable at the former hearing, the Board rejected her contention that the evidence was material. It held that the evidence did not prove that Guevara was likely to be persecuted upon her return to El Salvador; rather, the Board concluded that the documents proved only that she was likely to be detained and interrogated upon her return. Thus, the Board denied Guevara's motion to reopen, a decision which she now challenges on appeal.

The scope of appellate review of a decision denying a motion to reopen is very limited. Generally, in order to obtain reopening on appeal, an alien must make a prima facie showing that there is a reasonable likelihood that the relief sought would be granted at the reopened hearing.

> The prima facie showing includes not only that there is a reasonable likelihood that the statutory require-

> ments for the relief sought are satisfied, but also a reasonable likelihood that a grant of relief may be warranted as a matter of discretion.

Marcello v. Immigration & Naturalization Service, 694 F.2d 1033, 1035 (5th Cir. 1983). Thus, on appeal we must address two issues: whether the alien has shown (i) a reasonable likelihood that she has met the statutory requirements for the relief sought, and (ii) a reasonable likelihood that her case warrants the exercise of discretion in her favor.

The Statutory Framework

There are, in fact, two statutory remedies available to an alien who seeks to avoid deportation from the United States. The first is contained in 8 U.S.C. § 1253(h)(1), the statutory provision for withholding of deportation. This provision states that:

> The Attorney General *shall not deport or return* any alien . . . to a country if the Attorney General determines that such alien's life or freedom *would be threatened* in such country on account of race, religion, nationality, membership in a particular social group or political opinion.

(Emphasis added). Withholding of deportation, then, is a mandatory remedy available upon the alien's objective evidentiary showing that his life or freedom "would be threatened." *Id.*

The second remedy available to an alien is asylum. Until 1980, the Immigration and Nationality Act contained no formal mechanism for addressing requests for asylum made by refugees physically present in the United States. In that year, the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, was enacted to bring United States immigration laws into conformity with the United Nations Con-

vention Relating to the Status of Refugees.[6] The Refugee Act amends the Immigration and Nationality Act and defines as a refugee one who

> . . . is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .

8 U.S.C. § 1101(a)(42)(A). At 8 U.S.C. § 1158(a), the Refugee Act goes on to instruct the Attorney General to

> . . . establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determined that such alien is a refugee within the meaning of section 101(a)(42)(A) [8 USCS § 1101(a)(42)(A)].

The mechanism by which an alien may apply for asylum is codified at 8 C.F.R. § 208 (1985). That regulation requires that an applicant for asylum

> . . . establish that he/she is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of the country of such person's nationality or, in the case of a person having no nationality, the country in which such person

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[6] The United States agreed to comply with the provisions of this convention when it acceded to the United Nations Protocol Relating to the Status of Refugees on January 31, 1967. *See* 19 U.S.T. 6224, T.I.A.S. No. 6577, 606 U.N.T.S. 268.

> habitually resided, because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Id. In short, asylum is a form of discretionary relief which the Attorney General may grant to an alien who proves he possesses a "well-founded fear of persecution." *Id.*

Guevara has applied for asylum in the United States. She, like all other aliens who seek relief from deportation orders, bears the burden of proving that she has met the statutory requirements for relief she seeks. What she must prove to meet her evidentiary burden, however, is unclear. In *Immigration & Naturalization Service v. Stevic*, 467 U.S. ____, 104 S.Ct. 2489, 2501, 81 L.Ed.2d 321 (1984), the Supreme Court construed 8 U.S.C. § 1253, the statutory provision for mandatory withholding of deportation, and concluded that an alien seeking that statutory remedy must prove a clear probability of persecution in his native country before he is entitled to relief. 104 S.Ct. at 2501. Asylum, however, is quite a different statutory remedy and in *Stevic* the Court specifically refused to determine

> the meaning of the phrase "well-founded fear of persecution" which is applicable by the terms of the Act and regulations to requests for discretionary asylum.

Id.

Since the Supreme Court has declined to determine this issue, we must construe the language of the asylum regulation ourselves to determine whether Guevara has met the burden imposed on her by law.[7] Section 208.5, promul-

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[7] This is an issue of first impression in our Circuit. *See Bahramnia v. Immigration & Naturalization Serv.*, ____ F.2d ____ (5th Cir. 1986) [No. 85-4446, February 18, 1986, at 3204, 3212]; *Carmona v. Immigration & Naturalization Serv.*, No. 85-4563, slip op. at 6 (5th Cir. 1986) (unpublished).

gated pursuant to the delegation of authority in 8 U.S.C. § 1158, is the regulation which governs grants of asylum. It is written in disjunctive form. It states that the alien must prove she is unable to avail herself of the protection of her homeland because of *persecution or a well-founded fear of persecution.* 8 C.F.R. § 208.5 (emphasis added). The parties concede that Guevara cannot prove that she has been or will be persecuted within the meaning of the first element of the test; thus, we must construe the term "well-founded fear of persecution."

As we see it, the well-founded fear of persecution standard is at least partially subjective, because fear is a state of apprehension or anxiety not usually subject to rational measurement. *See Cardoza-Fonseca v. Immigration & Naturalization Serv.*, 767 F.2d 1448, 1452 (9th Cir. 1985), *cert. granted,* 54 U.S.L.Wk. (U.S. Feb. 25, 1986) (No. 85-782) (well-founded fear refers to subjective state of mind). The standard is only partially subjective, however, because it requires that the fear be a well-founded one. The alien's fear must have some basis in the reality of the circumstances; mere irrational apprehension is insufficient to meet the alien's burden of proof. *See Bolanos-Hernandez v. Immigration & Naturalization Serv.*, 767 F.2d 1277, 1283 (9th Cir. 1984) (alien must establish existence of a valid reason for fear). The term "persecution," in turn, contemplates a showing by the alien that "harm or suffering will be inflicted upon [her] in order to punish [her] for possession a belief or characteristic a persecutor sought to overcome." *Matter of Acosta,* Interim Decision No. 2986 (March 1, 1985). *See also Cardoza-Fonseca,* 767 F.2d at 1452 (persecution is infliction of suffering or harm upon one who differs in a way regarded as offensive to the persecutor).

Our reading of the regulation persuades us that the meaning of the term "well-founded fear of persecution" can be clearly and concisely stated. An alien possesses a

well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country. In so holding, we stand with the Sixth, Seventh, and Ninth Circuits which have previously determined that the "well-founded fear of persecution" standard imposed on asylum applicants differs from the "clear probability of persecution" standard imposed by *Stevic* on aliens who seek withholding of deportation. *See Youkahanna v. Immigration & Naturalization Serv.*, 749 F.2d 360, 362 (6th Cir. 1984) (clear probability of persecution standard applies only to petitions for withholding of deportation); *Carvajal-Munoz v. Immigration & Naturalization Serv.*, 743 F.2d 562-574-75 (7th Cir. 1984) (burden on asylum applicant is similar, but not identical, to that imposed by clear probability standard); *Bolanos-Hernandez v. Immigration & Naturalization Serv.*, 767 F.2d 1277, 1283 (9th Cir. 1984) (clear probability of persecution required for withholding of deportation, but alien seeking asylum need only establish a valid reason for fear).

We recognize that the Third Circuit has held that there is no difference between the proof required of an alien seeking asylum and that which is required of an alien who seeks withholding of deportation. *See Sotto v. Immigration & Naturalization Serv.*, 748 F.2d 832, 836 (3d Cir. 1984). In doing so, the Third Circuit relied heavily upon one of its own, pre-*Stevic* decisions, *Rejaie v. Immigration & Naturalization Serv.*, 691 F.2d 139 (3d Cir. 1982), in which it had concluded that the "well founded fear" and "clear probability" standards were identical. While that Court was constrained by its own jurisprudence, we find its reasoning in both *Sotto* and *Rejaie* to be neither persuasive or decisive.

Withholding of deportation is a *mandatory* form of relief to which an alien is *entitled* upon the Attorney General's determination that the alien's life or freedom

would be threatened if the alien were returned to her native country. 8 U.S.C. § 1253. Asylum, on the other hand, is a *discretionary* remedy which *may be* granted to an alien upon a showing that the alien cannot return to her native country because of *persecution or a well-founded fear of persecution.* 8 U.S.C. § 1158, 8 C.F.R § 208.5[.] The linguistic difference between the words "well-founded fear" and "clear probability" may be as striking as that between a subjective and an objective frame of reference. The difference in result which obtains when an alien meets the burden of proof imposed on an asylum claim and that which is imposed for withholding of deportation is equally as dramatic. We simply cannot conclude that the two standards are identical.[8]

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[8] We are aware that the Board of Immigration Appeals has interpreted the standards for asylum and withholding of deportation to be identical in its recent decision in *Matter of Acosta*, Interim Decision Number 2986 (March 1, 1985). Ordinarily, this interpretation would be entitled to deference, *see Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616, 627 (1965), but analysis of the differences between the two remedies provides us with "compelling indications that [the Board's interpretation] is wrong." *Red Line [sic] Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371, 384 (1969).

We disagree with the Board's interpretation in *Acosta* because it ignores the fact that the INS' own regulation is written in the disjunctive. Section 208.5 states that "an asylum applicant bears the burden of proving she is unable to return to her homeland because of persecution *or* a well-founded fear of persecution." The two phrases cannot be synonymous, any more than they can be coextensive, because each is an alternative method by which the alien can meet the statutory standard. It is a canon of statutory construction that, where possible, a statute should be read so as to give meaning to each of its clauses. Reading the two standards as coextensive has the effect of rendering the words "well-founded fear of persecution" mere surplusage. This we cannot do, so we decline to adopt the Board's interpretation.

Our determination that the proof required of asylum applicants differs from that required of aliens who seek withholding of deportation is consistent with the structure of the Immigration and Naturalization Act. In the words of the Seventh Circuit,

> Establishing an *entitlement* to withholding of deportation . . . should require a greater evidentiary burden than establishing 'refugee' status so as to be eligible for a *discretionary* grant of asylum.

Carvajal-Munoz, 743 F.2d at 575 (emphasis original). We agree that the evidentiary burden for establishing entitlement to withholding of deportation should be greater than that imposed on aliens who seek asylum, and we therefore decline to follow the Board's interpretation in *Acosta*.

The Prima Facie Case

Guevara has met her burden on appeal of proving a reasonable likelihood that she will meet the statutory requirements for asylum on reopening. *See Marcello*, 694 F.2d at 1035. The FBI documents indicate that the head of the Salvadoran military has personally taken an interest in her case. In addition, the Salvadoran authorities expressed an interest in obtaining the date and number of Guevara's flight, and in obtaining copies of the documents she had in her possession when she was arrested—documents which the authorities described as subversive literature. In light of that factual context, we think that a reasonable person in Guevara's circumstances would fear persecution on return to her native country. Thus, while we express no opinion as to the merits of Guevara's case on remand, we find that she has made a prima facie showing of a well-founded fear of persecution.

The fact that Guevara has made a prima facie showing that she is likely to meet the statutory requirements on remand is not, however, the end of the inquiry. We are also required by *Marcello* to find "a reasonable likelihood that

a grant of relief may be warranted as a matter of discretion." 694 F.2d at 1035. This issue was not squarely addressed by the briefs, but on these facts we certainly recognize that the Immigration Judge could reasonable exercise his discretion to allow asylum.[9]

We hold that Guevara has made a sufficient showing on appeal of a well-founded fear of persecution to permit determination of her claim by the Immigration Judge. This was factual information needed by the trier of fact—the Immigration Judge—on whom rests the initial, and sometimes decisive, burden of exercising congressionally imposed discretion. The Immigration Judge did not have this information, even though he needed it. The action of the Board, in its hindsight consideration, cannot supplant the Immigration Judge's right and duty to look at, and evaluate, this evidence. Guevara is, therefore, entitled to reopen her case before the Immigration Judge so that he may consider the FBI documents that Guevara has obtained since her initial hearing.

Confidentiality

Guevara's second contention on appeal is that the Government abused its discretion by failing to guarantee that the contents of her asylum application would be held in confidence by the INS. Her claim is premised upon her belief that the government breached its own official policies when it communicated directly with the Salvadoran government for the purpose of ascertaining her identity. Those disclosures, she claims, interfered with her ability to complete her asylum application in the confidence that its contents would not be disclosed and, therefore, deprived her of her ability to meaningfully apply for asylum.

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[9] Bound as we are by *Marcello*, we cannot refrain from pointing out that to require an advance holding that the Immigration Judge would exercise his discretion in favor of asylum is a contradiction in terms. Discretion can scarcely be so circumscribed.

Whatever Guevara's distress that her identity and activities have been called to the attention of the Salvadoran authorities, the awareness of such authorities does not result from a disclosure by the INS of the contents of Guevara's asylum application. Rather, the Salvadoran authorities became aware of Guevara by virtue of the FBI's disclosures during the course of its foreign counterintelligence investigation. While this, from Guevara's perspective, may by unfortunate, it is not a state of affairs that INS can, or through our orders, should correct.

The FBI is charged, with others, with protecting the security of the United States from foreign criminals, subversives, and terrorists. When it learns of an alien who has entered this country under suspicious circumstances, the FBI may properly, through official governmental channels, contact the authorities in the alien's home country to ascertain whether the alien represents a threat to the security of the United States. It would be naive to assert—and even more so to hold—that information pertaining to an alien may *never* be the subject of communications with the authorities in the alien's home country. Guevara's request for a blanket guarantee against all such communications or disclosures is without merit.

The INS, however, is charged with the rather less glamorous task of enforcing the immigration laws. INS policy is, and has been, to protect the confidentiality of asylum applications. In fact, it is INS policy "to refuse to disclose any asylum application without the consent of the asylum applicant."[10] The United States Department of

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[10] *See* Memorandum of David H. Lambert, Acting Associate Regional Commissioner of Examinations—Southern Region, Immigration and Naturalization Service, dated February 11, 1982.

State, to whom INS turns for advisory opinions regarding the merits of particular asylum applications, has a similar policy.[11]

The disclosures of which Guevara complains did not originate with the INS, nor did they have as their source the contents of an asylum application which had as yet to be filed. The FBI investigation in this case took place months before Guevara applied for asylum by partially completing Form I-589. Even had the application been on file at the time of the FBI disclosures, however, that fact would not have precluded the FBI from undertaking investigations which arose independently of the contents of the application itself.

There is no evidence in the record that INS has ever strayed from its policy of confidentiality with regard to the contents of Guevara's asylum application. Since the con-

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[11] "As a matter of policy and practice, information obtained from an asylum applicant, including the application, is held in confidence and we seek to maintain the confidentiality of such information." Letter of L. Arthur, Chief, Asylum Division, Bureau of Human Rights and Humanitarian Affairs, United States Department of State dated December 18, 1981.

On occasion the State Department may need to verify information contained in an asylum application. When such a need arises, the State Department avoids any attempt to contact the authorities in the alien's country. Instead, it sends a confidential cable to the United States Embassy in the alien's home country outlining the circumstances of the alien's case and the information which must be verified. Accompanying each such cable is the following caveat:

> Department's policy is to preserve confidentiality of asylum applications and [their] contents. Thus, information in this telegram about asylum requests should be divulged only to U.S. citizen personnel on need to know basis. If post in preparing reply needs to acquire or check information from local sources, it may do so but without divulging that asylum application ha[s] been filed in U.S.

See Letter of W. Tapley Bennett, Jr., Assistant Secretary of State for Legislative and Intergovernmental Affairs.

tents of the application have been held in confidence, the alien has received all of the guarantees of confidentiality to which she is entitled. We therefore dismiss as without merit Guevara's contention that the government has breached its own policies regarding the confidentiality of asylum applications.

Subpoenas

At her hearing before the Immigration Judge, Guevara sought to obtain an administrative subpoena under 8 C.F.R. § 287.4(a)(2). She sought two categories of material in her request. The first concerned the documents seized from her at the time of her arrest, and the second encompassed all communications between the governments of the United States and El Salvador regarding Guevara.

The motion for administrative subpoenas was denied by the Immigration Judge at the deportation hearing. On appeal, the Board concluded that the subpoenas had been properly denied because Guevara had failed to meet her burden of proving that the materials she sought were essential to her case and were otherwise unavailable. *See* 8 C.F.R. § 287.4(a)(2). Guevara contends that this decision was an abuse of the Board's discretion.

Our inquiry under an abuse of discretion standard is whether the agency exercised its discretion in a manner that was arbitrary and capricious. *Chokloikaew v. Immigration & Naturalization Serv.*, 601 F.2d 216 (5th Cir. 1979). We have reviewed the record and we cannot say that the decision to deny issuance of the subpoenas was an abuse of discretion. Thus, the decision of the Board on this issue is affirmed.

Conclusion

Over four years have elapsed since Guevara illegally entered the United States. Still more time will pass before her case reaches its final disposition. While we are reluc-

tant to burden the progress of summary deportation proceedings with a remand in this case, we are left with no alternative. Guevara is entitled to reopen her asylum application before the Immigration Judge, so we reverse the decision of the Board and remand for proceedings not inconsistent with this opinion. In all other respect, however, the decision of the Board is affirmed.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4767

ANA ESTELA GUEVARA FLORES, PETITIONER,

v.

IMMIGRATION & NATURALIZATION SERVICE, RESPONDENT.

June 9, 1986

ON PETITION FOR REHEARING

Before BROWN, REAVLEY and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

THOMAS M. REAVLEY

United States Circuit Judge

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

File: A26 804 596 – San Antonio

In re: ANA ESTELA GUEVARA-FLORES

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Thelma Garcia, Esquire
502 E. Harrison, 2nd Floor
Harlingen, Texas 78550

Lee J. Teran, Esquire
317 Alex Hamilton
San Antonio, Texas 78228

ON BEHALF OF SERVICE:
Gregory J. Ball
General Attorney

CHARGE:
Order: Sec. 241(a)(2), I&N Act [8 U.S.C 1251(a)(2)] – Nonimmigrant – Entered without inspection

APPLICATION:
Reopening; Asylum/withholding of deportation

July 25, 1984

The respondent moves to reopen our decision of May 16, 1984, wherein we dismissed her appeal from the immigration judge's decision finding the respondent deportable as charged and denying her applications for asylum and withholding of deportation. The motion will be denied.

Federal regulations at 8 C.F.R. 3.2 provide, in part, that, "Motions to reopen . . . shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 3.8(a) provides further that, "Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavit or other evidentiary material." Both provisions were strictly construed by the United States Supreme Court in *INS* v. *Wang*, 450 U.S. 139 (1981). Moreover, a motion to reopen should be granted only where a *prima facie* case of eligibility for the relief sought has been established. *Ibid.; Matter of Martinez-Romero*, Interim Decision 2872 (BIA 1981), *aff'd*, 692 F.2d 595 (9th Cir. 1982); *Matter of Rodriguez-Vera*, 17 I&N Dec. 105 (BIA 1979).

The respondent's motion to reopen is based on three documents from the Federal Bureau of Investigation which the respondent apparently was able to obtain only after her original deportation hearing when they were declassified. She claims these documents show she will be executed immediately upon return to El Salvador because of her political opinion. The respondent's motion papers also allege that as a result of the information referenced in the FBI documents which was provided to the Salvadoran government, her family was persecuted there.

We conclude the motion papers fail to make out a *prima facie* showing of the requisite persecution on account of the respondent's political opinion or other statutory basis. Preliminarily, we note that the respondent submitted absolutely no evidence in support of the claim that her family has been persecuted in El Salvador. As for the three FBI documents, one cable dated July 16, 1981, recites, in part, that the Salvadoran press had reported that American police arrested a woman alleged to be the Salvadoran terrorist subversive Norma Fidelina Guevara de Grande, and

that at the request of American government officials in El Salvador police here were investigating whether the woman arrested—the instant respondent—was this same terrorist subversive. A second cable of July 1981 states, in part, that the Salvadoran government did not believe the respondent to be the terrorist subversive "Comandante Norma" and she otherwise was not a known Salvadoran guerrilla. It also indicated that she may be detained upon return to El Salvador for investigation of violating Salvadoran law against the possession of subversive literature. Finally, an FBI memorandum dated July 8, 1981, revealed the following. When the respondent was arrested following her illegal entry near Laredo, Texas, officials discovered, in part, that she was carrying "a communication addressed to associates in San Juan, Puerto Rico," a translation of which "indicated it to be of the 'classic' Marxist rhetoric." The respondent acknowledged she had used a "code name" in El Salvador and "she showed deception on a polygraph examination to specific questions concerning terrorist activities." She also admitted that her sister was an active terrorist in El Salvador. This memorandum further indicated that the Salvadoran government asked to be advised when the respondent is deported.

Contrary to respondent's claims, the foregoing documents reasonably suggest only that the respondent may be questioned or detained in El Salvador in connection with an investigation into whether she is a terrorist subversive, not that she would be executed for her political beliefs. *See generally Matter of McMullen*, Interim Decision 2967 (BIA 1984). We conclude the respondent's motion papers fail to establish a *prima facie* case of either a clear probability that her life or freedom would be threatened or a well-founded fear of persecution in El

Salvador on account of her political opinion or other statutory basis. Accordingly, the respondent's motion to reopen will be denied.

ORDER: The motion is denied.

/s/ DAVID L. MILHOLLAN
Chairman

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

File: A26 804 596—San Antonio

In re: ANA ESTELA GUEVARA-FLORES

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Thelma Garcia, Esquire
502 E. Harrison, 2nd Floor
Harlingen, Texas 78550

Lee J. Teran, Esquire
317 Alex Hamilton
San Antonio, Texas 78228

ON BEHALF OF SERVICE:
Gregory J. Ball
General Attorney

CHARGE:
Order: Sec. 241(a)(2), I&N Act [8 U.S.C 1251(a)(2)]—
Nonimmigrant—Entered without inspection

APPLICATION:
Asylum/withholding of deportation

May 16, 1984

ORDER:

PER CURIAM. The decision of the immigration judge is affirmed. The respondent conceded the truth of the factual allegations contained in the Order to Show Cause and the immigration judge properly found that her deportability as charged is established by clear, convincing and

unequivocal evidence, a finding she does not challenge on appeal. The immigration judge also rendered a thoughtful and comprehensive decision denying the respondent's application for asylum and withholding of deportation, with which we fully concur. We find it unnecessary to elaborate thereon and note only that that decision was based upon two points: the respondent did not claim she might be persecuted in El Salvador because of any of the five enumerated grounds in section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(42), and even assuming she had, she failed to come forward with evidence sufficient to meet her burden to prove a "well-founded fear of persecution" within the meaning of the Act.

Two other matters require brief comment. Regarding the respondent's request for confidentiality of the asylum proceedings, the immigration judge took all appropriate measures within his authority to safeguard such confidentiality, including closing the hearing to the public. He could do no more. Consequently, the respondent's objections in this regard are without merit.

The respondent also sought to subpoena the attendance of various United States Government officials as witnesses or the reports and communications sent to or received from El Salvador by such officials and their agencies regarding the respondent and the woman whom she apparently once was erroneously identified as being, "Commandante Norma." Federal regulations at 8 C.F.R. 287.4(a)(2) require, in part, that an alien "show affirmatively that he has made diligent effort without success to produce the [witnesses or evidence]. Upon being satisfied that a witness will not appear and testify or produce documentary evidence and that his evidence is essential, the . . . special inquiry officer shall issue a subpoena." *See also Matter of Athanasopoulous*, 13 I&N Dec. 827 (BIA 1971). Here, we find no evidence that there

exist any final decisions denying the respondent's Freedom of Information Act requests to these officials and agencies, nor that the respondent has otherwise asked that these persons voluntarily appear and testify at the hearing and has been refused. The respondent also has failed to establish that the information she seeks is unavailable by means other than subpoena and that it is "essential" to her case. Moreover, if, as she claims, the facts surrounding her arrest and activities in the United States have been publicized in both the United States and Salvadoran media, then the substance of what she seeks to subpoena is already known. Accordingly, we agree with the immigration judge's denial of the respondent's subpoena requests and conclude that he did not abuse his discretion in this regard.

In view of all the foregoing, the appeal is dismissed. We further order that pursuant to the immigration judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

/s/ DAVID L. MILHOLLAN

Chairman

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
UNITED STATES IMMIGRATION COURT
SAN ANTONIO, TEXAS

File: A26 804 596

IN THE MATTER OF
ANA ESTELA GUEVARA-FLORES, RESPONDENT

IN DEPORTATION PROCEEDINGS

CHARGE:

ORDER:
Section 241(a)(2) I&N Act – [8 U.S.C. – 1251(a)(2)]
Entry Without Inspection

LODGED: None

APPLICATION: 1) Termination of Proceedings
2) Asylum and Withholding of Deportation
3) Voluntary Departure

July 28, 1982

ON BEHALF OF RESPONDENT:
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Lisa S. Brodyaga
Attorneys-at-Law
301 E. Madison
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and

Lee J. Teran, Esquire
Attorney-at Law
317 Alex Hamilton
San Antonio, Texas 78228

ON BEHALF OF SERVICE:
Gregory Ball
General Attorney
San Antonio, Texas

DECISION OF THE IMMIGRATION JUDGE

This is a deportation proceeding instituted by the Immigration and Naturalization Service against the above named respondent pursuant to the authority contained in Section 242 of the Immigration and Nationality Act.

The respondent is a thirty four (34) year old female alien, a native and citizen of El Salvador, who entered the United States at or near Laredo, Texas on or about June 24, 1981 without being inspected by an Immigration officer. On June 25, 1981 she was served with an Order to Show Cause charging that she is subject to deportation pursuant to Section 241(a)(2) of the Immigration and Nationality Act in that she entered the United States without inspection. At a hearing held on October 8, 1981 respondent, through counsel, admitted the truth of the factual allegations in the Order to Show Cause but declined to concede deportability explaining that as a refugee it would not be legally correct to deport her. Upon the basis of respondent's admissions, I have determined that she is deportable on the charge contained in the Order to Show Cause.

Upon respondent's refusal to designate a country to which she wished to be deported, I, pursuant to step 2 of Section 243(a) of the Immigration and Nationality Act, designated El Salvador, the country of respondent's nationality, as the country of deportation. When asked if there was any reason why she was unable or unwilling to return to El Salvador, she replied, through counsel, that she was unwilling to return because of the actions of the United States Government in informing the authorities in El Salvador of her presence in the United States and of certain documents she was carrying. At this point, counsel announced that respondent was ready to submit an application for political asylum and asked for a closed hearing and a guarantee of confidentiality (Exhibit 2). Respondent requested "that as a condition precedent to her testifying

as to any matters involving her life or work in El Salvador, her family members and associates, she be guaranteed that the matters so testified will be held in strict confidence by all branches of the United States Government, and that no such matter be communicated directly or indirectly to any person or entity in El Salvador, or who might communicate such matter to any person or entity in El Salvador." (See Exhibit 2 and letter dated October 20, 1981 from counsel to Department of State). I ruled that her request would be granted, but only to the extent that closed hearings are confidential.

On October 8, 1981 respondent executed her sworn Request for Asylum in the United States (Form I-589 and Addendum) and presented several supporting documents. This application shall also be considered as a request for withholding of deportation pursuant to Section 243(h) of the Act. Title 8, Code of Federal Regulations, Section 208. Shortly thereafter, the following documents were sent to the Asylum Unit, Bureau of Human Rights and Humanitarian Affairs, State Department, Washington, D.C., with a request for an advisory opinion:

(1) The Request for Asylum and supporting documents;
(2) Letter dated October 20, 1981 from counsel to State Department requesting a written guarantee of confidentiality; and
(3) Memorandum dated October 8, 1981 from the Trial Attorney for the Service to State Department stating that the Service had no objection to confidentiality.

In her application for asylum respondent described her occupation as a religious worker and alleged that if she returned to El Salvador, she would be persecuted, not on account of race, religion, nationality, political opinion or membership in a particular social group, but rather because of communications by the United States Govern-

ment with the military junta of El Salvador (See item 17 of Form I-589). In reply to a question as to whether she or any other member of her family had ever been detained, interrogated, arrested, convicted and sentenced, or imprisoned because of such communications, she stated: "In the United States, I have been accused of being La Comandante Norma, and have been imprisoned as a result. I have also been the subject of U.S. Communication with the authorities in El Salvador, placing myself and my associates in extreme jeopardy. My family members have had many problems in El Salvador after my arrest in the US and communication by the US with the junta." (See item 18 of Form I-589) She described her United States conviction as a violation of 8 USC 1325, which makes it a crime for any alien to (1) enter the United States at any time or place other than as designated by Immigration officers, or (2) elude examination or inspection by Immigration officers, or (3) obtain entry to the United States by a willfully false or misleading representation or the concealment of a material fact.

Without a written guarantee of confidentiality; however, respondent refused to furnish information concerning the following matters set forth in Form I-589 and Addendum:

(1) Her addresses for the past five years;
(2) Names, addresses, relationship and immigration status of relatives in the United States, other than spouse or children;
(3) Whether she had taken any action that she believed would result in persecution in El Salvador;
(4) Whether her family had suffered or been intimidated in any way because of her absence or her actions;

(5) Whether she had any other information relative to her case not covered by the other questions on Form I-589;
(6) Her former occupation(s)/employment and reasons for leaving;
(7) Her last address in El Salvador;
(8) The reasons she left El Salvador;
(9) How she traveled from El Salvador;
(10) Whether after leaving El Salvador, she traveled through or resided in any other country before entering the United States;
(11) Whether she applied for asylum in any such country;
(12) The reason she continued traveling to the United States;
(13) Whether she obtained an exit document if such document was required to leave El Salvador;
(14) Whether she had ever belonged to and was still an active member of any organization(s) which are considered hostile to the interests of El Salvador;
(15) Names, relationship and present location of any relatives outside the United States; and
(16) Supplementary information concerning Item #18 of Form I-589 such as dates, exact location of incidents, who took action against her and why, what position the individual held with the Government and the names and addresses of any witnesses.

By letter dated December 18, 1981, Mr. Lawrence Arthur, Chief, Asylum Division, Bureau of Human Rights and Humanitarian Affairs, Department of State, explained that although as a matter of policy and practice, information obtained from an asylum applicant, including the application, is held in confidence, his agency may and

sometimes does share such information with others who are charged with official responsibility for taking action on asylum requests or with those who have a direct and official need to know about the matter. He emphasized that he was not prepared to go beyond their policy and practices on confidentiality as outlined above. Applying the well established principle that an applicant for asylum has the burden of proof, he stated that in view of respondent's failure to answer relevant and pertinent questions about herself and her background except on her own terms, he was unable to conclude that she had met the burden resting on her of establishing a well-founded fear of persecution solely on the basis of the information she submitted.

On January 20, 1982 I furnished counsel with a copy of the advisory opinion and gave her until February 15, 1982 within which to submit an amended application. I further advised counsel that if such amended application was not submitted, I would schedule the case for further hearing in order to give respondent an opportunity to explain or rebut the opinion and to present evidence. Counsel replied that without an "unequivocal guarantee of confidentiality" respondent could not provide further information nor documentary evidence in support of her asylum application. Accordingly, the case was set for another hearing on March 31, 1982. During the course of the hearing, she reiterated her position that in the absence of an absolute guarantee of confidentiality, she could not furnish additional information concerning her application for asylum. Counsel announced, however, that she intended to furnish evidence such as newspaper articles that appeared in El Salvador as a result of respondent's arrest in the United States but that such evidence had not yet been received. Counsel was given until April 15, 1982 to submit such evidence with the understanding that it would be made a part of the record without further hearing. As of yet, no

such evidence has been submitted and consequently I must render a decision on the basis of the record as presently constituted.

An applicant for asylum or withholding of deportation must show that, if deported, he would be subject to persecution based on his race, religion, nationality, membership in a particular social group, or political opinion. To meet this burden of proof, an alien must demonstrate a clear probability that he will be persecuted if returned to his country or a well-founded fear of such persecution. 8 CFR 208.5. *See Matter of Dunar,* 14 I&N Dec. 310 (BIA 1973). Upon careful consideration of the evidence of record in the light of this well settled principle, I must agree with the State Department's advisory opinion that respondent has failed to meet the burden resting upon her of establishing that she is a refugee within the meaning of Section 101(a)(42)(A) of the Act which defines a refugee as a person who has "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." In the first place, the respondent does not claim she would be persecuted on account of any of the five grounds set forth in the statute. Item #17 of Form I-589 reflects that she believes she will be persecuted because of communications by the United States Government with the military junta of El Salvador. Secondly, even assuming, arguendo, that respondent seeks asylum because of her political opinions, she has not presented sufficient evidence to support such claim. As stated above, she failed to present evidence concerning her addresses during the past five years, her employment record, the existence and identity of relatives in the United States and abroad, her membership in organizations which might be considered hostile to the interests of El Salvador, the nature of her activities in El Salvador, her residence after leaving El Salvador, the persecution and intimidation suffered by her family

because of her absence or her actions, etc. In short, she had failed to present any facts that would allow the United States Government to check the veracity of her claim by checking with such sources as the State Department, the American Embassy in El Salvador or other governmental agencies.

At respondent's request, I ordered a closed hearing and excluded the public in general and the news media in particular from the hearing room. *Kashani* v. *INS*, 547F. 2nd 376(7 Civ. [*sic*] 1977); 8 CFR 242.16a. This procedure, together with the State Department policy articulated by Mr. Lawrence Arthur and the Immigration Service's policy set forth in a memorandum dated February 11, 1982, from the Acting Associate Regional Commissioner, Examinations, Southern Region to all District Directors and Officers in Charge, provide all the protection respondent is entitled to. See Appendix 1. A guarantee of confidentiality on the terms requested by respondent, on the other hand, would adequately handcuff the Government in complying with its responsibility to check the veracity of her claim. As stated by Lawrence Arthur in his advisory opinion:

> "The guarantee of confidentiality she seeks before she answers questions is one which would require 'all branches of the United States Government' to hold 'in strict confidence' everything she tells us; and that nothing she tells us may be given 'directly or indirectly' to anyone in El Salvador or to any one who might communicate such information to anyone in El Salvador. As we interpret it, such 'guarantee' would prohibit us from communicating with our diplomatic representation in El Salvador on any matter pertaining to any of the allegations she makes or may make."

The main thrust of respondent's contention appears to be that the extensive publicity this case has received, both in the United States and in El Salvador, constitutes grounds for asylum. The documents submitted by her in

support of her application reflect the following chronology of events: Norma Guevara, also known as Commander Norma, a well-known Salvadoran anti-government leader, was arrested by Salvadoran government authorities on February 4, 1980. Following widespread protests of her arrest and demands for her release made by activists who seized the Spanish Embassy in El Salvador, she was subsequently freed by a tribunal for lack of evidence on charges of distribution of subversive propaganda and hiding weapons. According to a spokesman for Amnesty International, it is not known where she went after her release. The Salvadoran military office suggested she went to Cuba and organized government terrorism from there.

On June 24, 1981, respondent was apprehended by Border Patrol agents near Cotulla, Texas. Upon discovering that she had in her possession certain documents which indicated she might be a government subversive in El Salvador, they reported their findings to the Federal Bureau of Investigation. At the same time a complaint was filed charging her with illegal entry in violation of 8 USC 1325. Involved in the investigation into respondent's identity were the Immigration and Naturalization Service, the Federal Bureau of Investigation, the United States Attorney and the news media. It is also obvious that the investigation included the Salvadoran government and news media. The investigation, which was to ascertain whether respondent was Commander Norma, the alleged leftist leader, resulted in a determination that that respondent is not Commander Norma.

Counsel for respondent contends that although according to the Service, it has now been established that respondent is not the Comandante, the damage has been done so far as concerns her ability to return to El Salvador without fear of persecution. I find no merit to this contention. No citation of authority is needed to support the

proposition that the United States Government has the power, as inherent in sovereignty, and essential to self-preservation, to ascertain the identity of every alien within its dominions. In fact, the very purpose of our laws relating to the inspection of aliens, laws which respondent violated by means of her surreptitious entry, is to ascertain the alien's identity, the purpose for which he seeks admission, the length of time he intends to remain "and such other items of information as will aid the immigration officer in determining. . . .whether he belongs to any of the excluded classes enumerated in section 212." Section 235 of the Act. In the instant case, the Border Patrol agents, once confronted with certain documents of a suspicious nature, had the absolute duty and responsibility of reporting their findings to higher authority. If, as respondent alleges, the tape and letter of introduction she was carrying at the time of her arrest, would result in her immediate execution in El Salvador, she could have supported her request for asylum, by testifying concerning the contents of such tape and letter and furnishing information concerning all other factors relevant to the issue of persecution. Publicity, however, resulting from a government investigation into an alien's identity, is not within the purview of Section 208 or 243(h) of the Act especially when the determination is favorable to the alien as in the instant case. The request for asylum is denied.

ORDER: It is ordered that in lieu of an order of deportation respondent be granted voluntary departure without expense to the Government or or before October 28, 1982, or any extension beyond such date as may be granted by the District Director, and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or

proceedings and the following order shall thereupon become immediately efffective: respondent shall be deported from the United States to El Salvador on the charge contained in the Order to Show Cause.

/s/ BERNABE Q. MALDONADO
Immigration Judge

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Supreme Court, U.S.
FILED
JAN 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-388

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE,

PETITIONER,

V.

ANA ESTELA GUEVARA FLORES,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-388

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner

v.

ANA ESTELA GUEVARA FLORES, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Ana Estela Guevara Flores, respectfully opposes the petition for certiorari filed by the Immigration and Naturalization Service in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 786 F.2d 1242. The orders of the Board of Immigration Appeals (Pet. App. 25a-31a) and the decision of the immigration judge (Pet. App. 32a-42a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1986, and a petition for rehearing was denied on June 9, 1986 (Pet. App. 24a). The petition for a writ of certiorari was filed on September 8, 1986. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

INTRODUCTORY STATEMENT

In INS v. Stevic, 467 U.S. 407 (1984), this Court held that an applicant for temporary withholding of deportation must show a "clear probability" of persecution. The circuits are now split on the question whether the statutory "well-founded fear of persecution" standard in asylum cases is different from or the same as this "clear probability" test. That question is now before the Court in INS v. Cardoza-Fonseca, No. 85-782, argued October 7, 1986.

Asserting this case presents that same question, the INS requests that the petition in this case be held pending the decision in Cardoza-Fonseca.

However, there is no good reason to hold the petition in this case. Since immigration judges are required by regulation to treat all applications for asylum as applications for withholding of deportation as well, the immigration judge on remand will determine the merits of respondent's application under both standards. If this Court's decision in Cardoza-Fonseca then makes it clear that there is only a single standard, the determination based on that standard can simply be applied to both applications. Since the remand is unlikely to run its course before the proper standard is announced, the cause of judicial and administrative efficiency will be served by permitting the remand to occur without delay.

Moreover, it has now been more than six years since respondent first applied for asylum and began this arduous process. A delay of the remand will continue to have serious adverse consequences for respondent. Until her status is resolved, respondent cannot obtain work authorization or certain public benefits, nor can she begin the process of obtaining permanent residence and eventual U.S. citizenship.

STATEMENT OF THE CASE

Respondent Ana Estela Guevara Flores is a native and citizen of El Salvador who last entered the United States in June 1981. Mistaking the respondent for a leftist leader named Norma Fidelina Guevara, "Comandante Norma", the INS referred her case for investigation to the Federal Bureau of Investigation and for prosecution for unlawful entry by the United States Attorney's office and commenced

deportation proceedings.[1] At a hearing in October 1981, Ms. Guevara Flores applied for political asylum before an immigration judge pursuant to Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1158(a), and for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. Sec. 1253(h).

Fearful that she and her family in El Salvador were endangered by the substantial publicity about her arrest and false accusations that she was the "Comandante Norma," respondent requested guarantees from the immigration judge that the contents of her asylum application and testimony would be held confidential before providing details about her activities,

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1/ INS admitted in court testimony that she was criminally prosecuted for unlawful entry, 8 U.S.C. 1325, in order to "hold her around a little longer in order to let the FBI complete their investigation." Orantes-Hernandez v. Meese, CV 82-1107 (C.D. CA), testimony of James W. Knight, November 21, 1986, p. 126.

political opinions, and the addresses of her close relatives. She also sought administrative subpoenas for all communications and correspondence between U.S. government agencies and with the Salvadoran government that concerned her.

The immigration Judge denied both motions. Fearing the consequences of additional breaches of her confidentiality, respondent then declined to answer numerous questions. The immigration judge found respondent had failed to show a clear probability that she would be subject to persecution in El Salvador and denied both asylum and withholding of deporation. (Pet. App. 38a) The judge did find that respondent merited the favorable exercise of discretion, and granted her the privilege of voluntary departure under section 244(e) of the Act, 8 U.S.C. Sec. 1254(e). (Pet. App. 41a-42a) She then appealed to the Board of Immigration Appeals (hereafter, "the Board") which

dismissed her claims. (Pet. App. 29a-31a)

Shortly after the Board's affirmance, respondent moved to reopen the proceedings below in light of material evidence that had not been available or discoverable at her initial hearing. 8 C.F.R. 3.2, 3.8 (1985) That evidence consisted of three declassified FBI cables which she had sought earlier, and which mentioned her specifically, but which the FBI withheld from her until roughly two years after her hearing. (Pet. App. 8a-9a)

As noted in her motion to reopen, the FBI cables illustrated the gravity of her situation if deported. The documents in her possession when she was apprehended had been requested by the Salvadoran authorities and identified her with those segments of the church in El Salvador which were opposed to the government's policies. Moreover, the cables conclusively demonstrated that even though the Salvadoran authorities had determined that she was not the Comandante,

the director of the Salvadoran National Guard, who is currently the Minister of Defense, was still actively pursuing her case and the U.S. government was aware that she was certain to be detained for political reasons. Furthermore, she represented that her family in El Salvador had been persecuted as a result of the FBI's disclosures to the Salvadoran authorities and their speculation about her activities.

The Board acknowledged that the cables reasonably suggested that the respondent "may be questioned or detained in El Salvador," but found they did not demonstrate that she would be "executed for her political beliefs."[2]

2/ The Board improperly construed "persecution" in the most narrow sense. As the Board has repeatedly noted, the concept of "persecution" encompasses either a threat to the life or freedom of, or the infliction of a broad range of "suffering or harm upon, those who differ in a way regarded as offensive," including confinement, torture, and severe economic deprivation. Matter of Acosta, Int. Dec. #2986 at 16 (BIA 1985); Matter of Laipenieks, 18 I & N Dec. 433, 456-57 (BIA 1983).

(Pet. App. 27a) Concluding that she had not presented sufficient evidence to meet her burden of establishing a prima facie case for asylum or withholding of deportation, her motion to reopen was denied. (Pet. App.27a-28a)

The Court of Appeals reversed the Board's denial of respondent's motion to reopen and remanded the asylum application for further proceedings. (Pet. App. 14a-18a) The court found that the new documentary evidence was material and "pertinent to the contentions raised in her asylum application" and that she had demonstrated a reasonable likelihood that she could meet the statutory requirements for relief in a reopened hearing.[3]

3/ Respondent is clearly endangered because of her affiliations with the church. The Board has recognized that persons "actively involved in the 'progressive' church in El Salvador are persecuted," Matter of Paniagua, A24 166 230 (BIA Jan. 23, 1985); See also, Matter of Sanchez and Escobar, Int. Dec. #2996 (BIA 1985), ("Considerable evidence was offered relating to claims that persecution occurred because of participation in specific groups that actively and publicly opposed the (continued on following page)

(Pet. App. 5a n. 2) In so doing, the Court joined the sixth, seventh, and ninth circuits in defining the "well-founded fear of persecution" standard which an asylum applicant must satisfy to be meaningfully different from the "clear probability" standard applicable to withholding of deportation claims. INS V. Stevic, 104 S. Ct. 2489 (1984).

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government's policies, including . . . religious leaders and activists . . . ."; "the only factor shown to be a basis forpersecution is the individual's actual or perceived political opinions")(emphasis added) at 12.

Moreover, there is considerable documentary evidence that nearly every political detainee in El Salvador is subjected to human rights abuse. Annual Report of the Inter-American Commission on Human Rights 1984-1985, OEA/Ser.L/V/11.66 doc. 10 rev.1 (Oct. 1985)("the IACHR has received . . . charges of cruel, inhuman or degrading treatment to which almost all persons of both sexes held by Salvadoran authorities have been subjected"; hundreds of persons have been held in custody for four or five years "without charges and without being brought before judicial authorities").

Contrary to the innuendos raised in petitioner's brief, after investigations by both the FBI and Salvadoran security forces, there is no evidence that respondent presents a security threat to that country.

REASONS FOR DENYING CERTIORARI

THERE IS NO REASON TO DELAY THE ADMINISTRATIVE REHEARING OF THIS CASE

The court of appeals was correct in ruling that respondent is entitled to have her asylum case remanded to the immigration court for the consideration of newly disclosed evidence. Petitioner, however, contends that this case should not be remanded and requests that the petition for certiorari should be held until this Court decides the standard of proof applicable to asylum determinations, an issue currently under review in INS v. Cardoza-Fonseca, No. 85-782, argued October 7, 1986. Although the court below did address the question presented in Cardoza-Fonseca, there is no good reason to grant or hold the petition in this case because its outcome does not necessarily depend upon this Court's precise formulation of the appropriate standard of proof.

According to regulations promulgated by the Attorney General, all requests to the immigration judge for political asylum "shall also be considered as requests for withholding of deportation" under Section 243(h) of the Immigration and Nationality Act. 8 C.F.R. 208.3(b). This Court has previously decided that in order to be eligible for a mandatory grant of temporary withholding of deportation the applicant must prove a "clear probability" of persecution. INS v. Stevic, supra. The government argued below and in its brief in Cardoza-Fonseca that an applicant must also demonstrate a "clear probability" of persecution in order to be eligible for political asylum under Section 208(a) of the Act, a question left open in Stevic.

The court below correctly decided that the "well-founded fear of persecution" standard applicable to requests for asylum is different and more generous than the

"clear" probability of perscution standard for withholding. That decision is supported by the statute's plain language and legislative history and is in accord with decisions of the second, sixth, seventh, and ninth circuits. See Carcamo-Flores v. INS, No. 85-4062 (2d Cir. Nov. 6, 1986), Yousif v. INS, 794 F. 2d 236, 241-42 (6th Cir. 1986), Youkhanna v. INS, 749 F. 2d 360 (6th Cir. 1984), Carvajal-Munoz v. INS, 743 F. 2d 562 (7th Cir. 1984); INS v. Cardoza-Fonseca, 767 F. 2d 1448 (9th Cir. 1985), cert. granted, No. 85-782 (Feb. 24, 1986), and Bolanos-Hernandez v. INS, 749 F. 2d 1316, 1322 (9th Cir. 1984). Only one circuit court disagrees with the fifth circuit and the other circuits regarding the meaning of the legal standard, and requires a showing of a "clear probability" of persecution in order to establish eligibility for asylum. Sotto v. INS, 748 F. 2d 832 (3d Cir. 1984).

No matter how the question presented in

Cardoza-Fonseca is decided, the controversy in this case can most efficiently be resolved by a prompt remand to the administrative agency to develop a full record. Because the regulations require the immigration judge to determine both whether respondent is eligible for both asylum and whether she is eligible for withholding of deportation, the underlying facts of her case will have to be assessed under both the "clear probability" and the "well-founded fear of persecution" standards.[4] As this case primarily concerns respondent's right to present material evidence previously withheld by the government, a disposition at this stage would deprive her of the opportunity to demonstrate for the first time her eligibility for relief under either

4/ Of course, if this Court's decision in Cardoza-Fonseca is handed down before the immigration judge renders his or her decision on remand -- a highly likely probability -- the correct standard can be applied.

formulation of the standard. Moreover, respondent may prove, as she has consistently asserted she can, that she has a "clear probability" of persecution and thus statisfy even the standard advocated by the petitioner. Cf. Aviles-Torres v. INS, 790 F. 1433 (9th Cir. 1986)(applicant found to have established a "clear probability" of persecution on similar facts). If any unresolved issues remain, judicial review at a later date, on a full record, will be preferable to review at this stage.[5] Los Angeles v. Preferred Communications, ____ U.S. ___, 90 L.Ed.2d 480, 488 (1986).

In other asylum cases in a similar posture, the Immigration and Naturalization Service has declined to seek a writ of

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5/ On remand, the immigration judge may find that respondent has met both standards of proof, or neither, in which case the outcome in Cardoza-Fonseca will have no impact on her case. The outcome there will only affect her case if the immigration judge finds that she meets the more generous "well-founded fear" (continued on following page)

certiorari and permitted remands from the courts of appeals even though those cases turned on the issue under review in Cardoza-Fonseca. Tejeda-Leon v. INS, No. 83-7863 (9th Cir. July 22, 1986); Natareno-Orosco v. INS, No. 85-7469 (9th Cir. June 9, 1986), Aguirre-Colindres v. INS, No. 84-7718 (July 10, 1986); Espinoza de Espinoza v. INS, No. 84-7401 (9th Cir. May 27, 1986); Cruz-Canales v. INS, No. 84-7075 (9th Cir. Nov. 21, 1985). In those cases, petitioner has recognized that, regardless of the outcome, each party will still be entitled to pursue

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standard for asylum but not the more stringent "clear probability" standard for withholding. In that event the INS can exercise its right to appeal to the Board of Immigration Appeals, as it currently does in numerous cases arising in the five circuits in which immigration judges currently apply different standards to asylum and withholding claims. If this Court later rules that the showing for asylum is the higher "clear probability" of persecution standard, the Board will sustain the INS appeal. On the other hand, if this Court upholds the Ninth Circuit position, respondent's entitlement to relief will finally be resolved.

administrative remedies if it determines the judge's findings conflict with this Court's subsequent disposition in Cardoza-Fonseca. For this same reason, the government does does not take the position that asylum hearings per se should be held in abeyance until the standard of proof is settled. As there are sufficient administrative remedies to correct any result which is inconsistent with Cardoza-Fonseca, there is no benefit to holding the petition and delaying a rehearing here.

On the other hand, assuming she is ultimately granted asylum, respondent has been prejudiced by the government's false accusations regarding her identity and its refusal to release the three FBI documents to her in a timely manner. Postponing a resolution will only compound that harm. For more than five years, respondent has had no recognized immigration status, no work authorization, and lived with the fear and

uncertainty that she may be deported. If she prevails, she will be entitled to work and might also be eligible for certain public assistance benefits. She would also become eligible, subject to the quota and eligiblity criteria in Section 209(b) of the Act, for adjustment of status to permanent resident one year after the grant of asylum. The creation of a full record and findings based thereon will serve to advance the final resolution of respondent's status, whereas holding this petition further delays a final resolution of her immigration status and entitlement to other benefits.

CONCLUSION

The petition for a writ of certiorari should be denied and this petition should not be held for a disposition in Cardoza-Fonseca, No. 85-782.

Respectfully submitted,

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